intended the priority of interests under the FCA to shift according to their relative economic value." *In re Operation of the Missouri River System Litigation*, 421 F.3d at 629-30. The court correctly explained that the Dakotas' "[a]rguments based on the wisdom of the priorities established by the FCA must be addressed to Congress." *Id.* at 630. *See also Ubbelohde*, 330 F.3d at 1030-32 (rejecting Dakotas' claims that Corps must maximize benefits to all interests on the Missouri River).

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 states "[a] petition for writ of certiorari will be granted only for compelling reasons." The rule illuminates the "character of the reasons" a petition might be granted, including the existence of a conflict between the circuit courts, of a conflict created by a state supreme court decision, or a decision determining an important Federal question for the first time or in a manner contrary to this Court's prior decisions. *Id.* The Dakotas' Petition has none of these characteristics. The Dakotas are attempting to use their Petition to obtain review of Congressional choices reflected in the Flood Control Act. A petition for certiorari is not the appropriate vehicle for the Dakotas' cause.

I. THE PETITION FAILS TO PRESENT COMPELLING REASONS TO GRANT CERTIORARI.

The Petition does not argue that there is a conflict among the Circuit Courts of Appeal with regard to the Question Presented. Nor does the Petition contend that the Eighth Circuit's decision represents the initial resolution of

an important Federal question. The Petition does not argue that the Question Presented was resolved in a manner contrary to this Court's prior decisions. In sum, the Petition entirely ignores Rule 10.

Rather, the Petition asserts two reasons that this Court should grant certiorari review: 1) the Court of Appeals "rewrote" the Flood Control Act; and 2) the Court of Appeals "ignored" the Corps' administrative interpretation of its obligations under the Flood Control Act. The first argument is incorrect as a matter of law. The second argument is incorrect as a matter of fact. Regardless, however, neither supports a grant of certiorari under Rule 10.

II. THE EIGHTH CIRCUIT ADHERED STRICTLY TO ITS PRIOR DECISION IN *UBBELOHDE* AND THIS COURT'S RULING IN *ETSI*.

In describing the priority of the mainstem reservoirs, the Eighth Circuit relied squarely on its prior decision in *Ubbelohde*. *In re Operation of the Missouri River System Litigation*, 421 F.3d at 629, n.7. There, the Court of Appeals explained:

> The [Flood Control] Act also laid out certain substantive interests that it was to serve. The dominant functions of the Flood Control Act were to avoid flooding and to maintain downstream navigation. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988). The Act's dominant functions were expressed repeatedly in three Congressional Documents: Senate Documents 191 and 247 and House Document 475. See Flood Control Act Section 9, 58 Stat. at 891. House Document 475,

> which represented one of two competing plans, confirmed this view, stressing flood control. H.R. Doc. No. 475, 78th Cong., 2d Sess. 28-29 (1944). At the same time, however, the Act recognizes secondary uses of the River including irrigation, recreation, fish, and wildlife. *See* Flood Control Act Section 4, 58 Stat. at 889-90; 33 U.S.C. § 708; 43 U.S.C. § 390.

Ubbelohde, 330 F.3d at 1019-20. *See also id.* at 1028 ("The Act recognizes what the Supreme Court has called the dominant functions of the River's reservoir system – flood control and navigation. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988). While flood control and navigation are dominant functions, the Act also recognizes recreation and other interests and secondary uses that should be provided for."); *id.* at 1032 (" . . . the Corps's primary concerns should be flood control and navigation. The Supreme Court appears to have accepted as much. *ETSI*, 484 U.S. at 512, 108 S.Ct. 805."). There is nothing surprising about the Eighth Circuit's adherence to *Ubbelohde* in the case below. In fact, as Nebraska pointed out in its briefs below, *Ubbelohde* represented the law of this case.[6] *See* Appellant's [Nebraska's] Opening Brief at 21.

As evidenced by the selected passages above, *Ubbelohde* relied on this Court's decision in *ETSI*. In *ETSI* this Court carefully reviewed the Flood Control Act, along with the Pick and Sloan Plans, and the committee report reconciling the two, to conclude that all reservoirs under

---

[6] To be clear, the instant Petition arises in the context of the same legal proceeding in which this Court denied certiorari in *North Dakota v. Ubbelohde*, 514 U.S. 987, 124 S.Ct. 2015 (2004).

the control of the Secretary of the Army had as their "dominant" purpose flood control and navigation. *ETSI*, 484 U.S. at 512, 108 S.Ct. at 815. Paradoxically, the Dakotas do not dispute that flood control is a dominant function of the mainstem reservoirs. Petition at 4, n.2. There is no basis on which to distinguish flood control from navigation in *ETSI's* treatment of the dominant purposes. This Court there explained: "The Sloan Plan recognized that the 'dominant function' of Lake Oahe and the other main-stem reservoir projects would be *flood control and navigation*, ..." *ETSI*, 484 U.S. at 512, 108 S.Ct. at 815 (emphasis supplied). The Petition, nevertheless, erroneously asserts that the portions of *ETSI* discussing the dominance of navigation on which the Eighth Circuit relied in *Ubbelohde* and again in the decision below are somehow "dicta." Petition at 17-20.

At issue in *ETSI* was the Secretary of the Interior's ability to contract for water in Lake Oahe, a Corps-operated reservoir. The petitioners, ETSI Pipeline Project, argued that the Secretary of the Interior possessed authority to contract for water stored in Lake Oahe without obtaining the Secretary of the Army's approval. In support, ETSI Pipeline Project argued that Sections 9(a) and (c) of the Flood Control Act (approving the Pick and Sloan Plans) indicated congressional intent to divide control of the mainstem reservoirs on the Missouri River in a manner that allowed the Secretary of the Interior to unilaterally allocate the water in Lake Oahe. 484 U.S. at 509, 108 S.Ct. at 813.

After reviewing in great detail the Pick and Sloan Plans, this Court found "nothing in those two plans indicates control over individual reservoirs was to be divided among various departments of the Federal Government." 484 U.S.

at 511, 108 S.Ct. at 814. Disposing of the petitioners' argument, the Court found that the Sloan Plan "recognized that the 'dominant function' of Lake Oahe and the other main-stem reservoir projects would be flood control and navigation, ..." 484 U.S. at 512, 108 S.Ct. at 815.[7] This determination was relevant because under the Pick and Sloan Plans, the agency "with primary interest in the dominant function of any feature proposed in the plan" maintained control over that feature. *Id.* Based on that analysis, this Court held that the Secretary of the Interior could not unilaterally contract for water stored in that reservoir because the Secretary of the Army controlled Lake Oahe under the jurisdictional design of the Flood Control Act. Thus, contrary to the Dakotas' suggestion, this Court's finding that flood control and navigation were the dominant functions of Lake Oahe was critical to its holding in *ETSI*.

This Court's determination in *ETSI* and the Eighth Circuit's holding in *Ubbelohde* reflect the will of Congress to subjugate recreation and fish and wildlife to flood control and navigation. Section 4 of the Flood Control Act, for example, states: "The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes . . . *when such use is determined by the*

---

[7] The Dakotas criticize the Eighth Circuit for relying on this passage because it does not, in the Dakotas' view, take into account the language of the Pick Plan. Petition at 18. This is a red herring. The Supreme Court explained clearly that the Sloan Plan "basically agreed with the Pick Plan, recognizing that the agency 'with primary interest in the dominant function of any feature proposed in the plan should construct and operate that feature,' . . . ." 484 U.S. at 512, 108 S.Ct. at 815.

Secretary of War not to be contrary to the public interest." (Emphasis supplied). There is no such "public interest" limitation on any other authorized use.

When speaking to the role of the mainstem reservoirs at issue here, the Pick-Sloan architects made their purpose clear: "All these reservoirs will serve *one fundamental purpose*, namely, that of impounding water in periods of heavy run-off from the land, and releasing it during periods of low stream flow." S. Doc. No. 191 at 21. (Emphasis supplied). Moreover:

> The use of the Garrison, high Oahe, Big Bend, Fort Randall, and Gavins Point Dams and Reservoirs as outlined above and agreed upon in the joint engineering report will provide the desired degree of flood control, supply the needs of irrigation as well as furnish cyclic storage for navigation during prolonged drought periods.

S. Doc. No. 247 at 3-4. The Sloan Plan similarly states, with regard to the reservoirs at issue:

> This basin-wide plan provides for a number of reservoirs on the upper reaches of the Missouri River and its tributaries, for the purposes of storing water, and releasing it during periods of low flow.

S. Doc. No. 191 at 17-18. The Plan explains that the water stored in Oahe Reservoir "will be available for navigation purposes on the lower river" and that ample storage capacity will be provided to reduce downstream flood flows from Sioux City to Kansas City. *Id.* at 116. Further, "[a]s the flow of the river at Oahe is to be regulated to permit downstream navigation, large outflows will be required during the navigation season, from March 15 to November

15 of each year." *Id.* Interpreting Pick, the Sloan Plan notes that on the mainstem of the Missouri River, the Corps intends to create storage "at the Garrison, Oak Creek, Oahe, Fort Randall, and Gavins Point sites for flood control, navigation, power production, and irrigation purposes." *Id.* at 121.

While the Pick and Sloan Plans recognized that construction and operation of mainstem dams and reservoirs would incidentally create recreation and wildlife opportunities, neither Plan contemplated operation of reservoirs or other facilities for the express purpose of promoting such interests to the exclusion of flood control or navigation. The notion that any of the Corps-operated reservoirs should be operated to retain water upstream in satisfaction of incidental recreational interests to the exclusion of enumerated downstream uses is simply inconsistent with the plan approved by Congress in 1944.

III. THE AGENCY INTERPRETATION TO WHICH THE DAKOTAS ASK THE COURT TO DEFER WAS ARBITRARY AND CAPRICIOUS.

The Petition suggests, alternatively, that the Eighth Circuit erred by refusing to defer to the Corps' interpretation that Congress established no priority in the Flood Control Act. The Dakotas fail to explain, however, that that interpretation represented a dramatic departure from *ETSI*, *Ubbelohde* and the Corps' earlier interpretation, which had governed Corps operations for over four decades. As the Joint Respondents argued to the Court of Appeals, the Corps' shift was arbitrary and capricious. *See, e.g.*, Appellant's [Nebraska's] Opening Brief at 12-16. The Court of Appeals recognized as much and properly refused to defer to the Corps' unreasonable interpretation.

Under this Court's decision in *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782 (1984), *see* Petition at 23, a court will defer to an agency's reasonable interpretation of an ambiguous statute. Review under *Chevron* is a two step process. The first step is to determine whether Congress has spoken to the question at issue: If the intent of Congress is clear, the matter is ended. A court, as well as an agency, must give effect to the unambiguously expressed intent of Congress. *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781. Where an agency's statutory interpretation is contrary to a court's previous interpretation, the court:

> need not decide what, if any deference is owed the [agency] in order to reject its alleged contrary interpretation. Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of the *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law.

Neal v. U.S., 516 U.S. 284, 285, 116 S.Ct. 763, 764 (1996). Stated differently, after a court construes the meaning of a statute on a particular matter, any attempt by an agency to interpret the statute to the contrary is reviewed under step one of *Chevron*. The court's interpretation becomes "the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781. "Once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position. . . ." *U.S. v. Mead Corp.*, 533 U.S. 218, 247, 121 S.Ct. 2164, 2182 (2001) (Scalia dissenting) (emphasis original). *See also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37, 112 S.Ct. 841, 848 (1992) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we

judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.").

To the extent there was any ambiguity with regard to the Corps' relative obligations under the Flood Control Act, the Court laid it to rest in *Ubbelohde*. It was only when the Corps attempted to circumvent *Ubbelohde* that the Joint Respondents challenged the Corps' about-face under the Administrative Procedure Act, 5 U.S.C. § 706(2).[8] By that time, this Court had denied certiorari review of *Ubbelohde*, and the law regarding the priority of the mainstem dams was settled. The Corps' repudiation of the Court of Appeals' *Ubbelohde* decision was simply arbitrary and capricious.

In light of *ETSI* and *Ubbelohde*, the Court of Appeals did not need to proceed beyond step one in the *Chevron* analysis to dispose of the Dakotas' claim. Setting aside for sake of argument the weight of *ETSI* and *Ubbelohde*, the Corps' interpretation fell short under step two of the *Chevron* analysis. Under step two, a reviewing court will defer to an agency's interpretation if it reflects a permissible construction of an ambiguous statute. An interpretation that is inconsistent with the agency's earlier interpretation, however, "is entitled to considerably less deference" than would otherwise be afforded under *Chevron*. *Watt v. Alaska*, 451 U.S. 259, 273, 101 S.Ct. 1673, 1681 (1981). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 447, n.30, 107 S.Ct. 1207, 1221 (1987) (same); *Thomas Jefferson Univ. v. Shalala*,

---

[8] Contrary to the Dakotas' contention, the Court of Appeals did not ignore the Corps' interpretation, but rather rejected it at the urging of the Joint Respondents.

512 U.S. 504, 515, 114 S.Ct. 2381, 2388 (1994) (same); *Pauley v. [illegible] Energy Mines, Inc.*, 501 U.S. 680, 698, 111 S.Ct. 2524, 2535 (1991) ("the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views.").

When an agency changes its interpretation, it is "obligated to supply a reasoned analysis for the change. . . ." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S.Ct. 2856, 2866 (1983). "Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation" are "pitfalls" to an agency receiving *Chevron* deference under step two. *Smiley v. Citibank*, 517 U.S. 735, 742, 116 S.Ct. 1730, 1734 (1996) (internal citations omitted). Moreover, "[a] settled course of behavior embodies the agency's informed judgment that, by pursing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those polices will be carried out best if the settled rule is adhered to." *Motor Vehicle Mfrs.*, 463 U.S. at 41-42, 103 S.Ct. at 2866.

The Corps recognized in earlier versions of the Master Manual that fishing and other recreational pursuits at the mainstem reservoirs were authorized only to the extent such pursuits did not interfere with other project purposes. For example, in the 1979 version of the Master Manual,[9] Section IX, ¶ 9-3 stated "*insofar as possible without serious interference* with the foregoing functions [flood control, irrigation, municipal and industrial and

[9] The title of this document is the MISSOURI RIVER MAINSTEM RESERVOIR SYSTEM RESERVOIR REGULATION MANUAL (1979). It is reproduced in the Joint Appendix filed with the Court of Appeals at pp. 01826-02069.

water quality, navigation and power], the reservoirs will be operated for maximum benefit to recreation, fish and wildlife." (Emphasis supplied). Section IX, ¶ 9-35 similarly provided "[w]hile manipulation of the levels of larger reservoirs (Fort Peck, Garrison, and Oahe) to enhance this function [outdoor recreational pursuits] is not practical, recreation will be recognized during periods of system storage drawdown by maintenance of balanced storage within these two [sic] projects *to the extent practical.*" (Emphasis supplied). *See also* Section IX, ¶¶ 9-31 and 9-38 (recognizing the unavoidable necessity of fluctuating reservoir levels to support functions for which the reservoirs were designed).[10]

These provisions of the 1979 Master Manual were consistent with the Corps' long-held interpretation that recreation and fish and wildlife interests were secondary uses subordinate to the Corps' duty to maintain the dominance of flood control and navigation. *See, e.g., The Role of Recreation in the Regulation of the Corps of Engineers Constructed and Operated Mainstem Reservoirs of the Missouri River*, 4 Great Plains Nat. Resources J. 26 (Fall 1999). The Corps' Office of General Counsel there explained that the mainstem reservoirs were "designed primarily to accommodate flood control, irrigation, navigation and power, with additional purposes such as recreation to be served to the maximum extent possible without

[10] Notably, as evidence of the Corps' interpretation that the Flood Control Act contains no priority, the Dakotas offer informal letters from Corps counsel and *post-hoc* rationalizations of counsel offered during this litigation. Informal statements are not authoritative under *Chevron* or related cases. *See generally U.S. v. Mead Corp., supra*. Moreover, courts cannot accept appellate counsels' *post-hoc* rationalizations for agency actions. *Motor Vehicle Mfrs.*, 463 U.S. at 50, 103 S.Ct. at 2856.

serious interference with the foregoing purposes." *Id.* at 48. The General Counsel opined, "any [Master Manual] revision involving a long term or permanent change in the operation of the system that would serve as a significant detriment to one or more of the actual purposes or the currently settled priorities of the system would suggest the need for prior congressional authorization." *Id.*

In attempting to adjust the relative priority of the mainstem reservoirs, the Corps provided no analysis supporting its new interpretation that all project purposes occupied a co-equal status. The Corps also failed to consider the impacts of downstream interests' legitimate reliance on its past treatment of navigation as a "dominant function." The Corps' reversal of its settled course of conduct was not entitled to *Chevron* deference, *see Smiley*, 517 U.S. at 742, 116 S.Ct. at 1734, and the Court of Appeals did not err when it refused to accord such deference to the Corps' impermissible interpretation of the Flood Control Act.

IV. THE DAKOTAS ASK THE COURT TO REVIEW AND JUDGE THE WISDOM OF CONGRESS' CHOICES IN THE FLOOD CONTROL ACT.

By this action, the Dakotas again seek judicial review of the wisdom of congressional choice reflected in the Flood Control Act. They contend that their Petition "is about allocating the Missouri River among seven states." Petition at 13. This, of course, reveals the true nature of what the Dakotas seek here – equitable relief designed to effectively allocate the waters of the Missouri River.

The Dakotas ask this Court to rewrite the historical development of the Upper Basin. They ask the Court make up for lost opportunities and benefits once foreseen but

never derived. Petition at 4-8, 24. The litigants, of course, may debate the Dakotas' account of the Basin's development. This is especially true in light of the fact that the very industries the Dakotas seek to enhance in this case were created in the first instance by construction of the mainstem reservoirs.

The Petition is about maximizing the Dakotas' interests at the expense of established downstream uses authorized by Congress and reliant on the "dominance" of flood control and navigation. It is about making up for opportunities lost. To the extent the Dakotas believe their interests are not adequately represented, the Dakotas may seek relief from Congress or attempt to invoke properly the original jurisdiction of this Court.

CONCLUSION

The Dakotas challenge the Court of Appeals' statement that the Flood Control Act prioritizes flood control and navigation above all other uses on the mainstem Missouri River reservoirs. Petition at 2. The Petition, however, expressly acknowledges that the Court of Appeals decided this issue in *Ubbelohde* over two years ago. Petition at 11 (" . . . the [*Ubbelohde*] court ruled that while the 1944 Flood Control Act requires the Corps to balance all uses, it gives navigation a priority."). This Court denied certiorari in *Ubbelohde*. The priority debate has been foreclosed, and the Dakotas are not entitled to revisit this issue. Perhaps recognizing the severity of their posture, the Dakotas' Petition again asks this Court to review the

wisdom of congressional choices made decades ago. Such a request is misplaced. The Petition should be denied.

Respectfully submitted,

JON C. BRUNING
Attorney General
DAVID D. COOKSON
Counsel of Record
Assistant Attorney General
State of Nebraska
State Capitol, #2115
Lincoln, Nebraska 68509
(402) 471-2682

Attorneys for the State of Nebraska

DONALD G. BLANKENAU
THOMAS R. WILMOTH
Counsel of Record
FENNEMORE CRAIG, P.C.
206 South 13th Street, Suite 1400
Lincoln, Nebraska 68508-2019
(402) 323-6200

Attorneys for the State of Nebraska and the Nebraska Public Power District

No. 05-611

FILED
FEB 16 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

STATE OF NORTH DAKOTA AND
STATE OF SOUTH DAKOTA, PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

JAMES C. KILBOURNE
ROBERT H. OAKLEY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Flood Control Act of 1944, ch. 665, 58 Stat. 887, requires the Army Corps of Engineers to give priority to navigation over other functions in managing the waters of the Missouri River Basin.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Black v. *Cutter Labs.*, 351 U.S. 292 (1956) 10
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 10
ETSI Pipeline Project v. *Missouri*, 484 U.S. 495 (1988) 3, 4, 9
Herb v. *Pitcairn*, 324 U.S. 117 (1945) 10
J.E. Riley Inv. Co. v. *Commissioner*, 311 U.S. 55 (1940) 10
M'Clung v. *Silliman*, 19 U.S. (6 Wheat.) 598 (1821) 10
Operation of the Missouri River Sys. Litig., In re:
277 F. Supp. 2d 1378 (J.P.M.L. 2003) 5, 6
320 F. Supp. 2d 873 (D. Minn. 2004), aff'd, 418 F.3d 915 (8th Cir. 2005) 6
South Dakota v. *Ubbelohde*, 330 F.3d 1014 (8th Cir.), cert. denied, 541 U.S. 987 (2004) 5, 11
Williams v. *Norris*, 25 U.S. (12 Wheat.) 117 (1827) 10

Statutes:

Act of May 18, 1938, ch. 250, 52 Stat. 403 3
Endangered Species Act, 16 U.S.C. 1531 *et seq.* 2

Statutes—Continued: Page

Flood Control Act of 1944, ch. 665, 58 Stat. 887 2
33 U.S.C. 701-1(b) 6
33 U.S.C. 708 3
33 U.S.C. 709 3
National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* 2
O'Mahoney-Millikin Amendment, 33 U.S.C. 701-1(b) 6
River and Harbor Act of 1935, ch. 831, 49 Stat. 1028 3

In the Supreme Court of the United States

No. 05-611

STATE OF NORTH DAKOTA AND
STATE OF SOUTH DAKOTA, PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 421 F.3d 618. The memorandum and order of the district court (Pet. App. 35-89) is reported at 363 F. Supp. 2d 1145.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2005. The petition for a writ of certiorari was filed on November 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a series of lawsuits filed by various States and other entities concerning the operation of

dams and reservoirs along the Missouri River by the United States Army Corps of Engineers (the Corps). The Judicial Panel on Multidistrict Litigation consolidated those lawsuits for pretrial proceedings. In the consolidated action, Nebraska, Missouri, and other downstream parties alleged that a new plan adopted by the Corps in 2004 to govern its management of the Missouri River dam system violated various statutes. In addition, environmental groups alleged that the actions of the Corps and the Fish and Wildlife Service in the Department of the Interior violated the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, and the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* The district court granted summary judgment to the federal defendants on all of those claims. Pet. App. 35-89. The court of appeals affirmed in relevant part. *Id.* at 1-34. Petitioners participated as appellees in the court of appeals, and supported the Corps against the claims of the downstream parties.[1]

1. Congress enacted the Flood Control Act of 1944 (Flood Control Act or the Act), ch. 665, 58 Stat. 887, to provide for the comprehensive management of the waters of the Missouri River Basin. Along with other legis-

---

[1] The environmental groups have filed their own petition for a writ of certiorari, challenging the court of appeals' disposition of their ESA and NEPA claims. See *Environmental Defense* v. *United States Army Corps of Eng'rs*, petition for cert. pending, No. 05-631 (filed Nov. 14, 2005). In addition, petitioner North Dakota, together with various state agencies and officials, has filed a petition for a writ of certiorari, seeking review of a separate decision in which the court of appeals rejected its claim that the Corps' operations violated state-law water-quality standards. See *North Dakota* v. *United States Army Corps of Eng'rs*, petition for cert. pending, No. 05-628 (filed Nov. 14, 2005). The federal respondents are filing separate briefs in opposition to those petitions for writs of certiorari.

lation, the Act authorized the Corps to build and operate a series of six dams and associated reservoirs, known as the Main Stem System, along the upstream portion of the river in Montana, North Dakota, South Dakota, and Nebraska.[2] The Act authorizes the Corps to contract for the use of surplus water available at the reservoirs, 33 U.S.C. 708, and to "prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs," provided that "the operation of any such project shall be in accordance with such regulations," 33 U.S.C. 709. The Act and its legislative history identify various purposes that the Corps is to serve in operating the Main Stem System, including flood control, provision of hydroelectric power, irrigation, recreation, navigation, protection of the water supply and water quality, and preservation of fish and wildlife. See, *e.g.*, *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 499-502 (1988).

The Corps has developed a water-control plan for operation of the Main Stem System, which is embodied in the Missouri River Main Stem Reservoir System Master Water Control Manual (commonly known as the Master Manual). Pet. App. 35. The Master Manual was first published in 1960 and was revised in 1973, 1975, and 1979. *Ibid.* The Master Manual sets forth general

---

[2] The six Main Stem System dams are as follows (with the associated reservoirs identified in parentheses): Garrison Dam (Lake Sakakawea), Oahe Dam (Lake Oahe), Big Bend Dam (Lake Sharpe), Fort Randall Dam (Lake Francis Case), Gavins Point Dam (Lewis and Clark Lake), and Fort Peck Dam (Fort Peck Lake). Congress authorized construction of the Fort Peck Dam in Montana in the earlier River and Harbor Act of 1935, ch. 831, 49 Stat. 1028, for the purpose of flood control and navigation; in 1938, Congress amended that statute to add the purpose of providing hydroelectric power, see Act of May 18, 1938, ch. 250, 52 Stat. 403.

guidelines for operation of the Main Stem System; in addition, each year, the Corps promulgates an Annual Operating Plan, which details its plans for the coming year. *Id.* at 7.

2. For several years beginning in the late 1990s, the Missouri River Basin experienced prolonged drought conditions, which forced the Corps to make decisions about the allocation of water among competing interests. Pet. App. 36. In 2002, petitioners sought and obtained preliminary injunctions in federal district court requiring the Corps to limit discharges from, and maintain water levels in, reservoirs within their respective States, in order to protect stocks for recreational fishing in those reservoirs. In the underlying lawsuits, petitioners claimed, *inter alia*, that the Corps' actions violated the Flood Control Act and the then-applicable 1979 version of the Master Manual.

The court of appeals vacated the preliminary injunctions. *South Dakota* v. *Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003). The court of appeals rejected the Corps' arguments that determinations about the operation of the Main Stem System were committed to agency discretion and therefore unreviewable. *Id.* at 1027-1030. Although the court recognized that "[t]he Flood Control Act clearly gives a good deal of discretion to the Corps in the management of the River," the court held that "[the Corps'] discretion is not unconstrained" because "the Act lays out purposes that the Corps is to consider in managing the River." *Id.* at 1027. The court noted that "[t]he Act recognizes what the Supreme Court has called the dominant functions of the River's reservoir system—flood control and navigation." *Ibid.* (citing *ETSI Pipeline*, 484 U.S. at 512). The court added, however, that "the Act also recognizes recreation and other inter-

ests and secondary uses that should be provided for" and that "[the Act] calls on the Corps to balance these various interests." *Ibid.* "What the text of the Act does not provide," the court concluded, "is a method of deciding whether the balance actually struck by the Corps in a given case is correct or not." *Ibid.* Although the court of appeals held that the Corps' actions were reviewable, it vacated the preliminary injunctions on the ground that petitioners were unlikely to succeed on the merits. *Id.* at 1030-1032. The court specifically rejected South Dakota's contention that, under the Flood Control Act, the Corps was required to "maximize[] the benefits to all interests." *Id.* at 1030. The court reasoned that the practical implication of that position would be to accord the Corps' decisions no deference at all. *Ibid.* The court remanded for proceedings on the merits of petitioners' claims. *Id.* at 1033. This Court denied review. 541 U.S. 987 (2004).

3. While the court of appeals was considering the Corps' appeal, other parties filed lawsuits in various district courts, also seeking to compel the Corps to alter its operation of the Main Stem System. The Judicial Panel on Multidistrict Litigation consolidated all of the lawsuits for pretrial proceedings before a single court in the District of Minnesota. *In re Operation of the Missouri River Sys. Litig.*, 277 F. Supp. 2d 1378, 1379 (2003).

The Minnesota district court ordered the Corps to issue a revised version of the Master Manual by March 19, 2004. Pet. App. 35 n.1. The Corps complied with that order and issued the revised version, which it had been preparing for many years. *Id.* at 35. Once the Corps formally adopted the 2004 version of the Master Manual, the plaintiffs filed amended complaints, and the

parties filed cross-motions for summary judgment. As is relevant here, Nebraska, Missouri, and other downstream parties claimed that the 2004 Master Manual violated various statutes, including the Flood Control Act of 1944. Although petitioners themselves brought other claims,[3] they defended the Corps' promulgation of the 2004 Master Manual as a proper exercise of the Corps' discretion under the Flood Control Act.

The district court granted the federal defendants' motion for summary judgment on all of the pending claims. Pet. App. 35-89. As is relevant here, the district court rejected the downstream parties' Flood Control Act claims. *Id.* at 39-44, 46. The court explained that, under the court of appeals' earlier decision in *Ubbelohde*, it "may only review the Corps' actions to ensure that the Corps considered all river interests when formulating a given plan." *Id.* at 41. The court reasoned that "the [Act] does not impose a non-discretionary duty to maintain minimum navigation flows or season lengths," *ibid.*, and concluded that "prioritization of river interests is discretionary," *id.* at 42. The court further recognized that the Corps had reserved the authority to deviate from the Master Manual in the event of changed

---

[3] North Dakota claimed that the Corps' operations violated state-law water-quality standards. In a separate set of opinions, the district court granted the federal defendants' motion to dismiss that claim, *In re Operation of the Missouri River Sys. Litig.*, 320 F. Supp. 2d 873 (D. Minn. 2004), and the court of appeals affirmed, 418 F.3d 915 (8th Cir. 2005). South Dakota claimed that the Corps' operations violated the O'Mahoney-Millikin Amendment, 33 U.S.C. 701-1(b), which prohibits any use of Missouri River waters in States west of the 98th meridian for certain navigation purposes where that use conflicts with a beneficial consumptive use for certain other purposes. The district court granted the federal defendants' motion for summary judgment on that claim, Pet. App. 44-46, and South Dakota did not appeal.

circumstances, but it concluded that any such deviation would be subject to judicial review. *Id.* at 43-44.

4. On appeal, North Dakota and South Dakota participated solely as appellees, again defending the Corps' promulgation of the 2004 Master Manual as a proper exercise of the Corps' discretion under the Flood Control Act. See, *e.g.*, North Dakota C.A. Br. 1 (noting that, while "North Dakota * * * is deeply displeased with the new Manual," "we acknowledge that Congress has given the Corps some discretion in managing the river," and adding that "[a]ll of the decisions challenged by the downstream interests * * * were well within the governing statutory framework"); South Dakota C.A. Br. 12 (contending that the prior version of the Master Manual was "in contravention of the [Act]," but conceding that the new version "will provide some relief if the Corps manages the reservoirs as stated").

The court of appeals affirmed in relevant part. Pet. App. 1-34. On the downstream parties' Flood Control Act claim, the court of appeals agreed with the district court that "the [Act] imposes no duty to maintain a minimum level of downstream navigation independent of consideration of other interests." *Id.* at 15. The court noted, as it had in its earlier decision in *Ubbelohde*, that flood control and navigation were the "dominant functions" of the Flood Control Act, but it added that the Act "does not set forth what level of river flow or length of navigation season is required to make navigation 'dominant' over a 'secondary' interest such as recreation." *Ibid.* The court therefore concluded that the Corps was required merely to consider all of the relevant interests, not to strike a particular balance among those interests, before making its management decisions. *Ibid.*